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No. 85-2014

In The

Supreme Court of the United States

October Term 1985

MICHAEL VAN McDOUGALL,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

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Respondent, the State of North Carolina, respectfully opposes and requests this Court to deny the Petition for Writ of Certiorari filed by Petitioner Michael Van McDougall seeking review of the judgment of the Superior Court of Mecklenburg County, North Carolina.

STATEMENT OF THE CASE

On the early morning of August 21, 1979, Petitioner Michael Van McDougall coaxed Vicki Dunno and Diane Parker to allow him into their home under the pretense that his wife had cut her leg "real bad" and needed medical attention. Once inside the home McDougall "commenced a campaign of terror against the two women, cutting, stabbing and slashing them with a butcher knife." ***State v. McDougall,*** 308 N.C. 1, 37, 301 S.E.2d 308, 329, ***cert. denied,*** 464 U.S. 865, 78 L.Ed.2d 173, 104 S.Ct. 197 (1983). There also was evidence that McDougall killed Diane Parker while attempting to rape her. The gory details of the crimes are summarized exhaustively by Justice Martin in the North Carolina Supreme Court's decision on appeal. ***Id.*** at 4-8, 301 S.E.2d at 311-13. Therefore, the State will summarize below only the evidence adduced at the evidentiary hearing on McDougall's Motion for Appropriate Relief which is relevant and necessary to an understanding of the issues he now raises for review.

A. Osborne's and Scofield's Preparation for Trial

The evidence at the evidentiary hearing tended to show the following. After McDougall's arrest, his family first hired Robert A. Karney, a Charlotte attorney, but became dissatisfied with his services.

(TEH 144-45)[1] On the advice of McDougall's employer, his family then retained Wallace Osborne. (TEH 79) Mrs. Randall Frech, McDougall's mother, agreed to pay Osborne $15,000 to represent her son on the charges. Because his practice was not primarily in the field of criminal law, Osborne, with the consent of McDougall's family, associated Michael Scofield to assist in the defense. (TEH 118, 208-09) Scofield was experienced in the defense of major criminal cases, having served as an Assistant United States Attorney in the Western District of North Carolina, as Chief Public Defender for the 26th Judicial District, and as a private practitioner. (TEH 117-18)

McDougall stipulated at the evidentiary hearing that he does not contend that there is any evidence of incompetency or error on the part of Osborne or Scofield. (TEH 4) As found as a fact by Judge Snepp, Osborne and Scofield thoroughly investigated the case and prepared for trial. "An enormous amount of preparation and work was put into the case by the defense team." (TEH 155) They investigated every possible lead that might have helped in the defense effort. (TEH 155) They retained a number of experts to assist the defense, including a psychiatrist, Dr. Stephen S. Teich; a "juristic psychologist," Courtney Mullin; a "correctional psychologist," Dr. Brad Fisher; at least three private investigators; another psychiatrist, Dr. Bacchus, from Atlanta; a Dr. Bresslar from Richmond; a chemist from Ohio who talked about pseudo-cocaine; a Dr. Jatlow from Yale University

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[1] Transcript references are to the transcript of the evidentiary hearing held in Mecklenburg County Superior Court upon McDougall's post-conviction Motion for Appropriate Relief.

who testified about the metabolic residue of cocaine remaining in the blood stream; and, John Allen, the Director of Open House in Charlotte who testified about the effect of cocaine and injecting it into the veins. (TEH 174-78) Osborne and Scofield filed an exhaustive number of motions (over 25) in the Superior Court prior to Jerry Paul's first appearance into the case.

Based on their investigation and assessment of the evidence, Osborne and Scofield both were of the opinion that "it was a foregone conclusion" that McDougall was going to be convicted and that the defense had no chance of proving McDougall was not guilty. (TEH 132, 211) According to Scofield, his proposed strategy was to put on a "polite defense" of not guilty and introduce McDougall's "mental problems." (TEH 132) Scofield did not feel that the defense had sufficient evidence to convince the jury that McDougall was insane. Both Osborne and Scofield agreed that the defense effort "should be geared toward the penalty phase and saving the man's life." (TEH 132) The problem faced by the defense attorneys was that McDougall, claiming amnesia, did not tell them what happened at the time of the crimes. (TEH 148)

In Scofield's first discussion with Mrs. Frech, he was told that McDougall was "a good boy from a good family," and that McDougall's only prior legal trouble had been "some minor misdemeanor matter in Georgia." (TEH 145) Scofield later found out that McDougall had pled guilty in Georgia to charges of rape and burglary, and that he "got some sort of ten-year sentence and served less than two years active." (TEH 151) After Osborne learned about the Georgia convictions, he raised the fee to represent McDougall.

(TEH 214-15) McDougall told Scofield that he could have beaten the Georgia charges "if he had had a fighter" to represent him. (TEH 152)

Scofield advised McDougall and his family that "it would be a victory in this case" if the defense attorneys could save McDougall's life. (TEH 152) Scofield even told Mrs. Frech that he thought McDougall was going to spend the rest of his life in prison. (TEH 153) Mrs. Frech replied that "she just couldn't stand anything more than about two years in a mental institution or something and she knew he needed help and she felt like after two years, he would be fine and should be released." (TEH 153) Because of Scofield's opinion that McDougall did not have a chance of being acquitted, McDougall's family expressed dissatisfaction with the attorneys before the trial. (TEH 146)

Osborne and Scofield approached the District Attorney's Office about whether a plea bargain might be arranged, but were told the case would be tried and that there would be no plea bargain possible. (TEH 168, 216)

In late October or early November, Scofield contacted Dr. Teich and retained his services to perform a psychiatric evaluation of McDougall. (TEH 174) Early in the case, Osborne and Scofield went to New York to meet with Dr. Teich and talk about the defense. While in New York, Dr. Teich requested that Osborne and Scofield meet with attorney Jerry Paul "to sort of get his thoughts on the case." (TEH 157) Dr. Teich later called Courtney Mullin, a juristic psychologist, and asked if she would be interested in working on the ***McDougall*** case. (TEH 34) Both Dr. Teich and Ms. Mullin had been associated with

Jerry Paul in prior criminal cases, and Dr. Teich had treated Paul as a physician.

B. McDougall Retains Jerry Paul as Lead Counsel

Because Dr. Teich was examining McDougall in anticipation of the defense attorneys raising an insanity defense, on January 30, 1980 the State moved to commit McDougall to Dorothea Dix Hospital in Raleigh for psychological evaluation by the Dorothea Dix staff. While McDougall was at Dorothea Dix Hospital during March 1980, Dr. Teich and Ms. Mullin also visited with him there. (TEH 223) McDougall first met Jerry Paul when Paul accompanied Dr. Teich and Ms. Mullin on one of their visits. Paul talked with McDougall about his background, and told him he had been involved in a number of first degree capital cases. (TEH 223-224) According to McDougall, Paul told him he had won all 150 murder cases in which he had been involved, including sixteen insanity-type cases.[2] (TEH 224) However, Paul did not talk to McDougall about being hired in McDougall's case.[3] (TEH 224) Paul wished McDougall luck and said "I hope everything comes out all right for you." (TEH 224) The next day, Ms. Mullin returned and told McDougall she was concerned about McDougall's attorneys, Osborne and Scofield. (TEH 225) She told

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[2] McDougall never introduced any evidence to contradict Paul's claim.

[3] Contrary to McDougall's misleading representation in his petition, (Petition at 6), Paul did not tell McDougall ***at their first meeting*** that McDougall's attorneys "hadn't done anything." It was only after Paul entered the case that he made disparaging comments about the other attorneys. (TEH 227) According to the evidence, Ms. Mullin was the first to make negative comments to McDougall about Osborne and Scofield, and to suggest that McDougall hire Paul.

McDougall that she did not think Osborne and Scofield had enough experience; "that they would be in over their heads"; that Dr. Teich felt the same way; and, that she thought it would be a good idea if McDougall would hire Jerry Paul. (TEH 225) McDougall replied that he would have to discuss the matter with his mother and with Scofield to see what they thought about hiring Paul. (TEH 225)

Immediately after his conversation with Ms. Mullin, McDougall used a pay phone and called his mother in Georgia. (TEH 225) He told her about meeting Jerry Paul and about what Paul had told him about winning cases. He also told her about his conversation with Ms. Mullin concerning Osborne and Scofield. Mrs. Frech said that the family would hire Jerry Paul if McDougall thought it would help, but she thought McDougall should talk to the other attorneys. (TEH 225) McDougall was discharged from Dorothea Dix Hospital back to the custody of the Mecklenburg County Jail in late March. (TEH 225-226) When he returned, McDougall called Scofield and told him that he needed to talk to him. Scofield came over to the jail and McDougall told him about the meeting with Jerry Paul. McDougall also informed Scofield that he was thinking about trying to hire Paul and asked Scofield, "Do you think you'll have any problems working with him?" (TEH 226) McDougall also said, "Look, if you tell me you can't work with this guy, tell me and we'll just stop right here." (TEH 226) Scofield replied, "Let me think about it." (TEH 226) When Scofield returned from vacation, he and Osborne met with McDougall and told him that they would have no problems working with Jerry Paul. (TEH 216, 226)

In late April 1980, Mrs. Frech and her daughter flew to Charlotte to meet with Jerry Paul, Scofield, Osborne, and Dr. Teich. Paul

told Mrs. Frech that he had been involved in numerous death penalty cases; that he knew how to conduct a capital trial; that McDougall desperately needed another attorney; that McDougall's attorneys really were not capable of preparing a death penalty case; and that if McDougall did not have other counsel, McDougall was going to lose the case. (TEH 65) Mrs. Frech asked McDougall if he wanted Jerry Paul as one of his attorneys, and McDougall answered "Yes." (TEH 65) Mrs. Frech said, "All right, Michael, if that's what you want. Its all right with us." (TEH 66) After the meeting between the attorneys and McDougall's family, Paul met with McDougall and made it clear that, "If he came into the case he would have to have control, or otherwise he would not be able to do any good." (TEH 227) Since McDougall wanted a "fighter" and was not satisfied with Osborne's and Scofield's strategy of a "polite defense," McDougall agreed that Paul would be lead counsel in the case. (TEH 227) Afterwards, McDougall told Osborne and Scofield that Jerry Paul would be lead counsel. (TEH 227) From that point forward, Paul made all major decisions in the case, (TEH 121), including the strategy of aggressively going after a verdict of not guilty, (TEH 132); whether there would be an early acknowledgment during the trial of McDougall's rape conviction in Georgia, (TEH 133); and whether McDougall would testify at the penalty phase of the trial, (TEH 134).

Jerry Paul proved to be the "fighter" that McDougall and his family wanted in the case. Jerry Paul wanted "to go real strong for a not guilty verdict." (TEH 132) Paul's trial technique was to use a "team defense," involving McDougall, his family, the three attorneys, Dr. Teich, Ms. Mullins, and others. The team defense employed the

specialized services of a pollster, a professor of psychology, a hypnotist, a toxicologist, and even a person to advise witnesses how to dress.

In mid-May, Jerry Paul visited McDougall's family in Kingston, Georgia to talk about the case. According to Mrs. Frech, upon Paul's arrival in the late afternoon, he went to the bathroom for what "must have been thirty minutes," leaving exposed on the bed a legal pad with the words "immoral mother, unfit mother." (TEH 66) Mrs. Frech admitted that she confronted Paul about the notation on the legal pad, and Paul replied "he wanted to use anything that he thought would help Michael." (TEH 83) During Paul's visit, Mrs. Frech called her daughter, Sandra Walls, telling her that there was "something wrong with Mr. Paul." (TEH 67) Paul sat down at the kitchen table to talk to Mrs. Frech and her daughter. (TEH 248) During their conversation, Paul asked if Mrs. Frech had anything sweet to eat. (TEH 67) Mrs. Frech served Paul a freshly-baked chocolate cake and a coke, and Paul ate almost half the cake. (TEH 67) According to Sandra, Paul went to sleep at the table. (TEH 248) Sandra and her mother stopped talking, looked at Paul, and Sandra said, "He's not with us anymore." (TEH 248) They nudged Paul and asked him if he was all right or needed help. (TEH 248) Paul mumbled that he was tired and needed to lie down. (TEH 67, 248) Paul went upstairs to his bedroom, while Mrs. Frech and Sandra remained in the kitchen. Later, Mrs. Frech and Sandra heard a loud crash and falling glass. (TEH 67, 248) They raced upstairs to find Paul down on his knees. (TEH 67, 248) Paul explained that he was not hurt and that he had been trying to raise the window for "a breath of fresh air." (TEH 67, 248-49) Leaving Paul to rest, Mrs. Frech and Sandra went back downstairs. (TEH 68, 249) About 9:00 p.m., Paul came down-

stairs and seemed to be all right for a period of time. (TEH 68, 249) He told Sandra that he wanted to talk to her husband, Jim Walls. Jim came over, and Paul chatted with him for a few minutes. (TEH 68, 249) Later, Paul said he was tired and sleepy, and would have to be at the airport the next morning at 8:30 a.m. When Mrs. Frech woke him the next morning, Paul seemed to be fine and ate a huge breakfast. (TEH 68) After breakfast, Mrs. Frech drove him to the airport to catch his flight. (TEH 68) During the ride, Paul started mumbling and appeared to fall asleep. When they arrived at the airport, Paul opened the car door and stumbled. (TEH 68)

When Mrs. Frech returned home, she called Scofield in Charlotte and asked him if Jerry Paul was on drugs. (TEH 69) Scofield replied, "Not that I'm aware of," but that he would check into the matter. (TEH 69) Scofield later called Mrs. Frech back and told her that he had talked to Dr. Teich about Jerry Paul. Dr. Teich told Scofield that Paul was having migraine headaches and was taking pain killers. (TEH 69)

Mrs. Frech also testified that she had "heard a little about" Paul's law license being suspended by the North Carolina State Bar. (TEH 77) When she asked Scofield about Paul's problems with the State Bar, Scofield replied that "it was just minor things" that had been taken care of, and that it was "nothing for [Mrs. Frech] to worry about." (TEH 77) Scofield testified that approximately three weeks before trial, he called a representative at the North Carolina State Bar and asked about the status of the Bar proceedings against Jerry Paul. (TEH 137) According to Scofield, the representative told him, "Fine, there's no problem. He [Jerry Paul] can participate in the trial." (TEH 137) Scofield noted that Assistant District Attorney Caudill

likewise inquired about the Bar proceedings against Paul, and was told there was no problem with Paul's law license and that he could participate in the trial. Scofield estimated that his inquiry was made around May 10, 1980, approximately three weeks before the trial started. (TEH 138) Scofield acknowledged that at the time of McDougall's trial in June, he was satisfied that Jerry Paul was licensed to practice law in North Carolina. (TEH 160)

After Jerry Paul entered the ***McDougall*** case, there were serious disagreements between counsel, often leading to "heated discussions." (TEH 38) Although Courtney Mullin testified that "[t]here was so little communication" on the defense team, (TEH 48), Scofield refuted that observation. According to Scofield, there were no communication problems between the defense attorneys, and certainly none that rendered their efforts "meaningless." (TEH 165) At the insistence of McDougall's family, Paul had decided "to go real strong for a not guilty verdict" on a Teich-based insanity defense in which McDougall would be portrayed as believing he was killing his mother. (TEH 132) Osborne and Scofield wanted to present only a "polite defense" of not guilty and introduce McDougall's mental problems at the guilt phase. (TEH 132) There were other disputes over whether McDougall's Georgia conviction would be brought out up front to avoid hurting the defense's credibility, (TEH 134), and also on the tactic of whether McDougall should testify. (TEH 134) There were other disagreements, including Paul's commenting on the case in the media, (TEH 125), and the filing of a federal lawsuit against the trial judge, Judge Ferrell. (TEH 131) On cross-examination, Scofield admitted that he himself had had a heated argument with McDougall about the filing of the lawsuit. (TEH 146) McDougall wanted

Scofield to file the lawsuit, but Scofield told him that he did not think that the lawsuit was a good idea. McDougall insisted, reminding Scofield that it was his case and he had paid for Scofield's services. (TEH 147) Scofield later signed the lawsuit but was so upset over the incident that he stayed away from the courtroom. (TEH 131, 148) However, the lawsuit incident occurred during jury selection, and the only day boycotted by Scofield was an afternoon of jury selection. Scofield was never absent during the actual trial of the case.

The transcripts show that during hearings on the pretrial motions before Paul came into the case, Osborne and Scofield both argued and participated in the hearings. Prior to Paul's first formal entry as counsel in the case, Scofield observed Paul appear to fall asleep in the courtroom. (TEH 136) However, at that time Paul was not sitting at counsel table, but was seated in the front row of the courtroom. The hearing was on the matter of McDougall's pretrial motion for an individual ***voir dire*** of the jurors. (TEH 166-67) On June 9, 1980, when the trial began with further hearings on the pretrial motions, Paul examined eight witnesses; Scofield examined ten witnesses; and, Osborne examined one witness.

On Friday, June 13, 1980, the jury selection began. Over the course of the next week, Paul handled ***voir dire*** of the prospective jurors for three days, and Scofield for two days. Osborne handled the ***voir dire*** examination of the alternate jurors. According to Courtney Mullin, Paul actively took part in the jury selection process. Both Osborne and Scofield testified that Paul did an "excellent job" on the jury selection. (TEH 166, 217)

C. The Trial

When the trial began on Monday, June 23, 1980, the State presented a total of fourteen witnesses in its case-in-chief. Scofield cross-examined eight of these witnesses, including Vicki Dunno, the survivor of McDougall's attack and the State's main witness. Paul only cross-examined four witnesses. Two of the State's witnesses were not cross-examined. According to Scofield, Paul was alert and forceful during his examination of the witnesses, and Scofield thought he did a "good job" when examining the witnesses. (TEH 165-66) Osborne also characterized Paul's examination of the witnesses as "competent and effective," and offered his opinion that "the net results were successful." (TEH 217)

Jerry Paul had suffered from severe migraine headaches for a number of years. As a result of the illness and death of his son in 1977, Paul suffered from a deep mental depression which exacerbated the migraines. (State Bar Records 118-30)4

Dr. Teich began treating Paul for depression during 1979. (State Bar Records 116). By the end of April 1980, Dr. Teich was of the opinion that Paul was emotionally, intellectually, and physically capable of practicing law. (State Bar Records 144)

Paul experienced a number of migraine headache attacks during the jury selection and trial. Nine times during the period from June 9 until July 25, 1980, Paul went to Charlotte-area hospitals for treatment of his migraine headaches, received medication for these headaches, and was then released. (TEH 181-95) The majority of the

4References to the State Bar Records are to McDougall's Exhibit #1 below, which was certified to North Carolina Supreme Court.

hospital visits were at night. Four of the visits fell on days when there was no court -- June 14, June 15, July 4, and July 20. The other visits to the hospital -- June 11, June 26, July 7, July 14, and July 16 -- when compared to the trial transcript for those days, show that Paul functioned as an active and vigorous advocate during court. The only time a headache interfered with his examination of a witness, Paul asked for and was granted a recess. According to Scofield, Judge Ferrell "on several occasions" gave the defense team a recess when Paul became ill with a headache. (TEH 162) There was no evidence that Paul was ever in court in a drugged condition. Both Osborne and Scofield testified at the evidentiary hearing that they never saw any indication Paul was under the influence of drugs. (TEH 164, 218) Osborne testified that he never saw Paul's performance as a trial lawyer affected by any apparent pain or intoxication. (TEH 218) Judge Ferrell also offered in his affidavit that he did not observe Paul to be under the influence of any drugs or other intoxicating substances. (Affidavit of Judge Forrest A. Ferrell)

On two occasions when Paul was unable to conduct the examination of witnesses as he had planned, Scofield did so in his place. (TEH 123) Although Scofield questioned whether his examinations of these witnesses were as effective as when he prepared in advance, he did indicate that he talked with each of the witnesses before they took the stand. (TEH 123-24) On cross-examination, Scofield also admitted that he had been able competently to carry on the examinations, and that he later had received a letter from one of the witnesses commending him for one of the "best cross-examinations" he had ever undergone. (TEH 161)

At the close of the State's case-in-chief, Scofield made and argued the defense's non-suit motion.

Both Scofield and Paul made opening statements for the defense. Of the defense witnesses called to testify, Paul examined eight witnesses; Scofield examined thirteen witnesses; and, Osborne examined two witnesses. Scofield also cross-examined all five of the the State's witnesses on rebuttal. On surrebuttal, Paul examined three witnesses, Scofield four, and, Osborne one. Dr. Brad Fisher was called as a witness at the evidentiary hearing to testify that he was not properly prepared for his testimony at the guilt phase of the trial. (TEH 102) However, Dr. Fisher offered no specifics as to how his testimony would have been different had he discussed it with the attorneys beforehand. On cross-examination, Dr. Fisher admitted that he had worked with Jerry Paul on a prior case, and that he had forwarded a full report on the results of his examination of McDougall to Scofield. (TEH 104, 106) Dr. Fisher also admitted that he had conferred with Dr. Teich about the results of the tests and gave his conclusions. According to Judge Snepp, "[the] transcript gives no indication that [Dr. Fisher] was not well prepared to testify." (Petitioner's Appendix A at 17a) It was Judge Snepp's impression that Dr. Fisher "suffered from a bruised ego." ***Id.*** At the conclusion of the evidence, all three defense attorneys made closing arguments to the jury.

At the penalty phase, Scofield made and argued motions prior to the presentation of evidence. Although Scofield and Paul disagreed on whether Paul should cross-examine Mary Huff, the State's first witness who testified about the crimes committed against her by McDougall in Georgia, Paul did cross-examine the witness at McDougall's request. (TEH 166) According to Scofield, "I didn't

think that he should cross-examine her at all, but I think when he did the cross-examination, it was as good, under the circumstances, as anybody could have done." (TEH 166) Paul also examined four of the defense witnesses at the sentencing phase; Scofield examined two witnesses; and, Osborne examined one witness.

Courtney Mullin testified at the evidentiary hearing that no one prepared her for her testimony at the sentencing phase of McDougall's trial, and that her testimony was "disjointed" as a result. (TEH 46) However, Ms. Mullin, an adamant opponent of the death penalty and experienced witness, admitted that she was able to relate the "substance" of her testimony to the jury and that "all the facts" were in her testimony. (TEH 59-60) Other than her feeling that her testimony was incoherent, she cited no specific instances of any deficiencies in her testimony. Judge Snepp found that the transcript of Ms. Mullin's testimony did not show she was unprepared to testify, and that she had "related to the jury in detail, at both the guilt and penalty stages, her treatment of [McDougall] and his statements to her." (Petitioner's Appendix A at 16a)

All three defense attorneys made arguments to the jury at the conclusion of the sentencing hearing. According to Osborne, the three attorneys had discussed in advance their strategy for the arguments to the jury, and had agreed that each would cover a different area. (TEH 217) Scofield testified that Paul spent "a great deal of time thinking about his closing argument and talked to Dr. Teich about it" in Scofield's presence. (TEH 164) The jury consisted of six whites and six blacks, (TEH 164-65), and Paul's argument was to be geared toward the blacks on the jury. (TEH 165) Paul discussed with Scofield his "strategic decision" to attempt to "hang-up" one of the

black jurors so that the jury would recommend only a life sentence. (TEH 179) According to Scofield, Paul specifically said, "he thought he could hang up one of the black jurors." (TEH 179)

Osborne made the first penalty phase argument to the jury. The theme of Osborne's argument centered on the irrevocability of the decision to recommend the death penalty, McDougall's redeeming qualities, and that it was not the responsibility of the jury to seek vengeance. Scofield argued next, and emphasized that each of the jurors had to make up his or her own mind about whether to recommend the death penalty, and that if the jury was unable to agree on a verdict, then McDougall would not be sentenced to death. Scofield also reviewed some of the mitigating factors that had been presented during the trial and sentencing hearing. Scofield further argued that sentencing McDougall to life in prison would cause McDougall to die "a slow death."

Assistant District Attorney Caudill next argued to the jury in favor of a recommendation of the death penalty. Caudill's argument was interrupted on several occasions by objections from Scofield and Paul.

Paul had the last argument to the jury during the penalty phase. (Petitioner's Appendix C) Paul's argument had been carefully planned, and his emphasis, which he discussed with Dr. Teich, Osborne, and Scofield, was to "hang up" the jury by reaching one of the black jurors.

Charlotte attorney Allen A. Bailey, on the basis of reading the closing arguments, offered his opinion by affidavit that Paul's argument was "insulting, disjointed, and below the standard of practice in

criminal cases." (Affidavit of Allen A. Bailey) However, Bailey admitted that he was not present at the trial and had not read the transcript of the trial. Judge Ferrell, who presided over the trial and who has heard at least nine capital cases, stated the following about Paul's argument:

> Jerry Paul's delivery of his jury argument during the penalty phase was as good as, if not better, then the majority of death penalty arguments I have heard. He was matter of fact and "homey". He had a flowing argument, at times passionate, but always respectful in the sense that I could see nothing offensive to the jury by his mannerisms, the techniques he employed, or the content of his argument. He effectively presented an argument which called into play the conscience of the jurors. I perceived his remarks about his work with Dr. Martin Luther King as a way to establish his credentials with the jury as a personality philosophically opposed to the death penalty generally. In my opinion, Mr. Paul's comment that "If there's a spoiled brat, as he talks about in this courtroom, it's him. Only a spoiled brat would get up in anger and ask you to kill," was an appropriate response to the prosecutor's having just called McDougall a spoiled brat in his jury argument. Paul's argument dealt with the theme that the jurors should reject the death penalty as being generally wrong and dangerous to some of the jurors' self-interest. Mr. Osborne and Mr. Scofield by their arguments had already argued why they felt the death penalty was wrong specifically in this case. The three defense arguments

> meshed, in my opinion, to present to the jury the significant points against imposing the death penalty on Michael McDougall. The jury deliberated almost seven hours before returning a recommendation of death.
>
> It is my professional opinion, as a trial judge who has presided over many serious felony trials and nine capital cases, that Jerry Paul's argument was appropriate, effective, and well within the range of competence and expertise expected of attorneys in criminal cases.

(Affidavit of Judge Forrest Andrew Ferrell at 3)

REASONS THE WRIT SHOULD NOT ISSUE

I.

THE STATE COURTS PROPERLY DECIDED McDOUGALL'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN ACCORDANCE WITH *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 80 L.ED.2D 674, 104 S.CT. 2052 (1984), SINCE THE UNIQUE FACTS OF THE INSTANT CASE ARE NOT AMENABLE TO THE NARROW PRESUMPTION OF A SIXTH AMENDMENT VIOLATION NOTED BY THIS COURT IN *UNITED STATES V. CRONIC*, 466 U.S. 648, 80 L.ED.2D 657, 104 S.CT. 2039 (1984); THEREFORE, PETITIONER HAS FAILED TO DEMONSTRATE ANY COMPELLING REASONS WHY THIS COURT SHOULD REVIEW THE STATE COURT'S DECISION BELOW.

Obviously recognizing that he cannot meet the prejudice requirement for ineffectiveness of counsel claims under ***Strickland v. Washington***, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), Petitioner now seeks the issuance of a writ of certiorari from this Court on the ground that only his death sentence should be reviewed because Jerry Paul's overall representation of him compels the presumption of prejudice recognized by this Court in ***United States v. Cronic***, 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984). In support of this argument, Petitioner highlights his allegations that Paul twice was the subject of suspension orders by the North Carolina State Bar shortly before his trial; that during his trial Paul made visits to area hospital emergency rooms seeking treatment for his migraine headaches, and ingested a number of narcotic drugs; that Paul allegedly engaged in illegal and unethical behavior during his representation of Petitioner; and that Paul delivered an incoherent and offensive argument to the jury at the end of the sentencing phase of the trial. The State court rejected these arguments and instead subjected Petitioner's ineffectiveness allegations to the ***Strickland*** analysis. (Petitioner's Appendix A at 6a-21a) Petitioner does not allege or show that this decision is in conflict with other state or federal cases, and has proffered no other compelling reasons for this Court, in its discretion, to review this case. Supreme Court Rule 17.1. Moreover, a brief review of Petitioner's allegations confirms the conclusions of the State courts that relief is not warranted under the unique facts of this case.

A. Paul's Disbarment

Despite conceding the State court's finding of fact that Jerry Paul, one of the three privately-retained attorneys hired by his family,

was duly licensed to practice law in North Carolina at the time of his trial, (Petition at 13), Petitioner persists with his myopic argument that Paul nevertheless "had actually been ordered suspended from practice at the time of petitioner's trial," and that such disbarment invokes the ***Cronic*** presumption of prejudice. It is true that in January and again in May of 1980 the North Carolina State Bar issued orders suspending Paul from practicing law due to neglect of his obligations to certain clients. (Petitioner's Appendix A at 6a) However, as noted and found as a fact by the State court, due to Paul's motions and appeals of right the suspension orders did not become effective until April 2, 1981, almost a year after Petitioner's trial. At the time of Petitioner's trial in June and July of 1980, Paul in fact still was duly licensed to practice law in North Carolina, and the finding of this historical fact is supported by the record. Indeed, both co-counsel Scofield and Assistant District Attorney Caudill had confirmed with the State Bar that there was no problem with Paul's law license and that he could participate in the trial. (TEH 137-38).

While it may be true ***arguendo*** that the Sixth Amendment guarantee of counsel means representation by an attorney licensed to practice law, ***see. e.g., United States v. Hoffman***, 733 F.2d 596, 599 (9th Cir.), ***cert. denied***, ___ U.S. ___, 83 L.Ed.2d 409, 105 S.Ct. 521 (1984), the suspension of an attorney from practice before his or her state bar does not automatically result in a lack of representation by counsel or a ***per se*** Sixth Amendment violation. ***Roach v. Martin***, 757 F.2d 1463, 1479-80 (4th Cir.), ***cert. denied***, ___ U.S. ___, 88 L.Ed.2d 154, 106 S.Ct. 185 (1985) (no prejudice presumed where lead counsel was under investigation for disbarment at time of trial); ***United States v. Hoffman, supra*** at 599-600 (defendant's representation by attorney

who was suspended from his home state bar during federal district court trial was not ***per se*** Sixth Amendment violation); ***United States v. Sielaff***, 542 F.2d 377, 380 (7th Cir. 1976) (subsequent disbarment of counsel was irrelevant to his performance at trial); ***Hernandez v. Wainwright***, 634 F.Supp. 241, 246 (S.D.Fla. 1986) (counsel's disbarment five years after defendant's conviction did not render representation automatically deficient.

Here, at the time of Petitioner's trial Paul was duly licensed to practice law in North Carolina, and his disbarment did not become effective until almost a year later. Moreover, Petitioner totally ignores the fact that he was represented by two other attorneys, Osborne and Scofield, throughout his trial. Neither the competence nor law licenses of these attorneys are challenged by Petitioner. The availability of such a defense team of attorneys easily distinguishes this case from the few decisions in which courts have applied a ***per se*** rule and found that the right to counsel was violated. ***Compare Solina v. United States***, 709 F.2d 160, 168 (2d Cir. 1983) (defendant unknowingly represented by law school graduate who had failed the bar examination twice and had not been admitted to any other bar); ***Harrison v. United States***, 387 F.2d 203, 212-14 (D.C. Cir. 1967) (one defendant's conviction reversed because government used statements elicited earlier during trial when the defendant was represented by an ex-convict posing as a lawyer), ***rev'd on other grounds***, 392 U.S. 219, 20 L.Ed.2d 1047, 88 S.Ct. 2008 (1968); ***Huckelbury v. State***, 337 So.2d 400 (Fla. Dist. Ct. App. 1976) (law school graduate had been refused admittance to Florida State Bar for failure to meet standards of character and was not a member of any other bar).

Therefore, under the present facts, the mere fact that orders of suspension had been issued against Paul did not result in a ***per se*** Sixth Amendment violation. Petitioner cites no controlling precedent for such a ***per se*** rule, and has not shown the State court's decision to the contrary to be in conflict with any applicable federal or state decisions.

B. Paul's Migraine Headaches

Petitioner also complains that Paul was physically incapacitated by migraine headaches and narcotic drugs during the trial, and therefore the ***Cronic*** presumption of prejudice should be applied. However, an attorney's physical condition or ingestion of drugs is not in itself enough to constitute a ***per se*** Sixth Amendment violation. ***See, e.g., Berry v. King***, 765 F.2d 451, 454 (5th Cir. 1985) (fact that attorney used drugs during trial was not solely determinative of ineffective assistance of counsel claim); ***Young v. Zant***, 727 F.2d 1489, 1492 (11th Cir. 1984), ***cert. denied***, ___ U.S. ___, 84 L.Ed.2d 390, 105 S.Ct. 1371 (1985) (Petitioner's observations that counsel ingested drugs during trial did not automatically support claim of constitutional ineffectiveness). The critical inquiry, as properly determined by the State court, is whether under ***Strickland, supra***, regardless of the cause, Paul's representation of Petitioner was deficient and whether this deficiency prejudiced Petitioner.

Petitioner clearly failed to make the required showing under ***Strickland***. The evidence does not show, and Petitioner has not identified, any specific error resulting from Paul's mental or physical condition. On the contrary, the State court found that

> Paul actively and vigorously participated in the vast majority of all aspects of the

> trial. He conducted lengthy ***voir dire*** examination of jurors; examined and cross-examined numerous witnesses; lodged proper objections; participated in planning sessions with co-counsel; conferred with defendant; argued motions; made jury arguments; and otherwise discharged the duties of a defense counsel.

(Petitioner's Appendix A at 10a) Moreover, whenever Paul was unable to be in the courtroom, both Osborne and Scofield were at the defense table and fully discharged the adversarial role in Paul's absence. On the occasions when Paul was unable to examine a witness, Scofield had adequate opportunity to confer with the witness and effectively conduct the examination. (Petitioner's Appendix A at 10a) Although Petitioner emphasizes Paul's visits to area hospital emergency rooms and the drugs prescribed for Paul, the State court found that all but one of these visits were at night, and that on the day after three of the visits the trial court was in recess. (Petitioner's Appendix A at 10a) "During the afternoon of June 26, 1980, on the evening of which one of the visits took place, Paul conducted lengthy examinations of witnesses upon ***voir dire***." (Petitioner's Appendix A at 10a) Despite some testimony that Paul appeared to doze in court, he never appeared to his co-counsel or the presiding judge to be under the influence of narcotics. (Petitioner's Appendix A at 9a).

Therefore, the State court properly applied ***Strickland*** in concluding that Petitioner did not receive ineffective assistance of counsel because of Paul's migraine headaches and ingestion of drugs during the trial. Paul's headaches and drug use are not enough to constitute a ***per se*** Sixth Amendment violation.

C. Paul's Ethical Violations

Contrary to Petitioner's argument, this case does not provide this Court with a compelling opportunity to define the relationship between canons of ethics and the Sixth Amendment. The State court found that during his representation of Petitioner Paul had violated a number of canons of the Code of Professional Responsibility of the North Carolina State Bar, and also may have committed a felony by furnishing drugs to Petitioner or suggesting perjury. (Petitioner's Appendix A at 14a) However, the State court held that, under ***Strickland***, Petitioner had failed to show that such acts prejudiced his defense.

> The evidence does not show prejudice. What it does show is that the defendant had the assistance not only of three lawyers, but of a number of experts in other forensic fields. The whole record demonstrates that there was a well defined, and pursued, theory of defense-insanity-which in view of the evidence as to circumstances of the crimes and defendant's apprehension thereafter, was the only reasonable one available. That it failed does not demonstrate that its pursuit was outside the range of effective representation.

(Petitioner's Appendix A at 14a-15a) Likewise, this Court recently held that "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." ***Nix v. Whiteside***, 475 U.S. ___, ___, 89 L.Ed.2d 123, 134, 106 S.Ct. 988, 994 (1986). Given the facts of this case, including the absence of any prejudice to the defense as a result of Paul's actions, review of Petitioner's allegations about Paul's ethical violations is not warranted.

D. Paul's Sentencing Argument

Finally, as in the State court below, the only specific aspect of counsel's performance which Peitioner challenges is Paul's closing argument at the sentencing phase of the trial. (Petitioner's Appendix C) Petitioner complains that the argument was a "disjointed and patently offensive oration" which demonstrates that Paul was impaired. On the contrary, the State court found that "[t]he evidence is undisputed that Paul intentionally framed his argument to influence black members of the [jury] panel, worked hard on it, and discussed it with Dr. Teich." (Petitioner's Appendix A at 20a) Paul's emphasis, which he discussed with Dr. Teich and Scofield, was to hang up the jury by reaching one of the black jurors. Indeed, even the jury ***voir dire*** questions by Paul show that he was setting this strategy as he picked the jury. Until he was stopped by the trial court, Paul attempted to educate the jurors about the death penalty's alleged historical use against blacks and lack of a deterrent effect. Moreover, Paul tried to remind the black jurors that the ruling class (i.e., the whites) would use the death penalty as a tool to control them.

When integrated with the arguments of Petitioner's other attorneys, Osborne and Scofield, the inescapable conclusion is that sparing McDougall's life was addressed from every possible angle. Osborne and Scofield argued to the jury the mitigating, religious, and personal reasons for the jury not to recommend the death penalty. Scofield even improperly emphasized the effect of a deadlocked jury, which clearly helped to set up Paul's theme that the black jurors should protect their own self interests by recommending life imprisonment rather than the death penalty. Therefore, the State court correctly held that under ***Strickland, supra***, Paul's closing argument at the sentencing

phase of the trial was not unreasonable and that Petitioner had failed to show any prejudice as a result. (Petitioner's Appendix A at 21a) Nothing about the State court's decision regarding Paul's argument warrants review on ***certiorari***.

II.

SINCE THE INSTRUCTION ON SECOND-DEGREE MURDER WAS SUPPORTED BY THE EVIDENCE AND PETITIONER WAS CONVICTED ONLY OF FIRST-DEGREE MURDER UNDER THE FELONY-MURDER RULE, THE FORMER NORTH CAROLINA PRACTICE OF AUTOMATICALLY INSTRUCTING THE JURY ON SECOND-DEGREE MURDER IN CAPITAL CASES OF PREMEDITATED AND DELIBERATED FIRST-DEGREE MURDER DID NOT PREJUDICE PETITIONER, AND THEREFORE, DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL IMPORTANCE WARRANTING REVIEW BY *CERTIORARI*.

Petitioner next attempts to concoct an issue worthy of ***certiorari*** by arguing that under ***Roberts v. Louisiana***, 428 U.S. 325, 49 L.Ed.2d 974, 96 S.Ct. 3001 (1976) and ***Hopper v. Evans***, 456 U.S. 605, 72 L.Ed.2d 367, 102 S.Ct. 2049 (1982), the capital punishment procedure in effect in North Carolina at the time of his trial violated the Eighth and Fourteenth Amendments because juries in capital cases of premeditated and deliberated first-degree murder were always instructed to consider a verdict of second-degree murder, even if there was no evidence to support such a verdict. However, as noted by the State court, Petitioner failed to raise this issue on his direct appeal to the North Carolina Supreme Court thereby waiving this issue under N.C.G.S. §15A-1419(a)(3) (1983). (Petitioner's Appendix A at 23a)

Although the State court proceeded to find this issue to be without merit as a matter of law, its express reliance on the procedural bar precludes federal review regardless of its alternative discussion of the merits. ***Davis v. Allsbrook***, 778 F.2d 168, 176 (4th Cir. 1985). ***See Wainwright v. Sykes***, 433 U.S. 72, 81, 53 L.Ed.2d 594, 604, 97 S.Ct. 2497, 2503 (1977) (adequate and independent state ground for decision bars review in federal courts).

Moreover, any error in the instruction on second-degree murder was harmless. ***See Rose v. Clark***, ___ U.S. ___, 54 U.S.L.W. 5023 (July 2, 1986). The first-degree murder charge in Petitioner's case was submitted to the jury on both theories of premeditation and deliberation, ***and*** the felony-murder rule. (Petitioner's Appendix A at 22a) The jury found Petitioner guilty of first-degree murder based only on the felony-murder rule. The possible verdict of second-degree murder was submitted to the jury as an alternative verdict to first-degree murder based on premeditation and deliberation, which was to be answered only if the jury failed to find Petitioner guilty of first-degree murder under either theory. (Petitioner's Appendix A at 22a-23a) In addition, as a matter of State law, the evidence as to Petitioner's ingestion of drugs would have supported an instruction on second-degree murder. ***State v. Kirkley***, 308 N.C. 196, 222, 302 S.E.2d 144, 159 (1983) (second-degree murder instruction properly submitted where defendant offered evidence of his intoxication and mental disorders). Therefore, the practice overruled by the North Carolina Supreme Court in ***State v. Strickland***, 307 N.C. 274, 289-90, 298 S.E.2d 645, 655-56 (1983), did not prejudice Petitioner in any way, and review by ***certiorari*** is not warranted. ***See Hopper v. Evans***, 456 U.S. at 613-14, 72 L.Ed.2d at 374-75, 102 S.Ct. at 2054 (mere

existence of Alabama preclusion law did not render death penalty statute unconstitutional).

CONCLUSION

Neither of the issues presented by Petitioner raises a substantial federal question deserving of this Court's discretionary review. The State court's decision is not in conflict with any other federal or state cases, and, on the unique facts of this case, there are no other special and important reasons for this Court to grant review by writ of certiorari. Accordingly, Respondent, the State of North Carolina, respectfully requests that the Petition for Writ of Certiorari be denied.

This the 23rd day of July, 1986.

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